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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant-Petitioner,

v.

GEORGE TRIBBLE,
Plaintiff-Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITIONER'S REPLY BRIEF

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NOTE: The listing of all subsidiaries and affiliates of Westinghouse Electric Corporation, as required by Supreme Court Rule 28.1, was previously submitted in the Petition for a Writ of Certiorari.

REPLY TO PLAINTIFF'S STATEMENT OF THE CASE

In response to plaintiff's Brief in Opposition, petitioner, Westinghouse Electric Corporation ("Westinghouse"), notes at the outset that plaintiff's "Statement of the Case" contains blatant errors and misstates or mischaracterizes certain evidence and law necessary to determine whether the Eighth Circuit properly applied the law as set down by this Court in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and its predecessors. This point is well illustrated by the fact that very few of the statements made in plaintiff's Statement of the Case are supported by citations to the record in the case, and many of the citations which are made do not support the statements made by plaintiff. Although Westinghouse will not at this time point out every misstatement or error contained in plaintiff's Statement of the Case, as they are too numerous to discuss in detail, this discussion will set forth several examples of the misstatements and errors contained therein.

Plaintiff submits that "he applied for four separate positions in Defendant corporation. Although Plaintiff was qualified for each position, all four were filled by younger, less qualified persons." Plaintiff's Br. 2. However, the evidence showed that plaintiff applied for only two jobs within Westinghouse: the job in the RCAC Division and the job in the Lamp Division (Tr. 69, 72). There was *no* evidence that plaintiff had ever applied for the job in Chicago, and there is direct testimony that plaintiff *did not* apply for the job in Southeast Florida (Tr. 214).

Plaintiff also repeatedly claims that he was qualified for each of the four positions in question, but makes no citation to the record. However, Plaintiff's own testimony revealed that his only work experience in the last twelve years had been that of a business development representative in St. Louis, Missouri and Memphis, Tennessee (Tr. 52, 105). Similarly, plaintiff's recurring statements that the persons who did fill those positions were

"less qualified" than plaintiff is a conclusory statement, totally unsupported by the evidence.[1]

Plaintiff continually ignores the evidence of record. Plaintiff states that "[t]he man who filled [the Chicago job] had no experience as a business development representative." Plaintiff's Br. 2. However, the man who filled the job had already worked for the person who hired him, as an active member of Westinghouse's business development team in the Chicago area (Tr. 304). Furthermore, the man who filled the job had other qualifications which made him well-suited to the job (Tr. 304-307). Finally, although plaintiff complains that he did not obtain this job, he never even applied for it.

Plaintiff also submits that "Defendant asserted that Plaintiff was not qualified for [the Kansas City] job because he did not have a college education (Tr. 198). However, the man who was hired for the position did not have a college degree (Tr. 338)." Plaintiff's Br. 3. However, plaintiff has conveniently excised a portion of Westinghouse's statement, in an attempt to intentionally mislead this Court. The entire statement indicated that plaintiff did not obtain that job "because he did not hold a college degree *and did not have broad enough experience or qualification in the area to compensate for the lack thereof.*" (Tr. 198) (emphasis added). Westinghouse further asserted that the man hired for the job *did* have the requisite experience to compensate for the lack of a college degree (Tr. 198). Obviously, when the statement made by Westinghouse is taken in its entirety, it has a very different meaning than that asserted by Plaintiff in the distorted excerpt set forth in plaintiff's brief.

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[1] There is no evidence in the record to support plaintiff's contention. In contrast, Westinghouse cited extensive evidence in the record in its Petition for a Writ of Certiorari (at p. 6) to support its statement that the persons who were hired or transferred into the jobs in question were more qualified for those jobs than was plaintiff.

Plaintiff also states that the man hired for the job in Kansas City "had only four years of limited experience" (Plaintiff's Br. 3). However, the evidence was uncontroverted that, for the last four years, that man had been very successful in his employment, and had been doing the exact job which the job at Westinghouse now required him to teach others to do (Tr. 158, 332, 334-335). There was no evidence that that experience was "limited", or that plaintiff had similar experience.

Plaintiff further concludes that "[a]lthough the job title [of the Florida job] was different, this job was the same as that held by the plaintiff." Plaintiff's Br. 3. Plaintiff again ignores the extensive uncontradicted testimony that the Area Manager job required managerial expertise and bilingual capabilities not possessed by plaintiff, and not involved in any business development representative's job (Tr. 207-213, 219, 222-238, 249, 252-253). Also, plaintiff did not apply for this job (Tr. 214).

Finally, as there was no evidence that plaintiff had the requisite qualifications for the position in the Lamp Division, plaintiff's statement that he "could have filled" that position is totally unsupported by the record and is merely a self-serving conclusion (Plaintiff's Br. 3). Such a statement, supported only by a citation to a statement that plaintiff, as a business development representative, "*should have had* knowledge of all [Westinghouse] products," is improperly included in a statement of facts, as it merely represents plaintiff's own opinion of himself (see Tr. 189, cited by plaintiff). The person who hired the man to fill the job in the Lamp Division testified extensively as to the requirements for the job (Tr. 166-167, 172-177, 182-185). Plaintiff never adduced any evidence that he met those requirements. Thus, there was no evidence that he "could have filled" that position. Certainly, plaintiff's assistance to a Lamp Division representative in *attempting* to make a sale did not qualify him for the actual job, along with all its techincal qualifications, especially since, although not mentioned by plaintiff, the sale was never made (Tr. 191-192).

Plaintiff not only misstates the facts to this Court, but, in his Statement of the Case, he misquotes this Court by arguing that

> [t]his Court granted certiorari in *Furnco Construction Co. v. Waters,* 98 S.Ct. 2943 (1978) to resolve "important questions raised by [Furnco] regarding the exact scope of the prima facie case: in age discrimination cases" and the "nature of the evidence necessary to rebut such a case." *Furnco* at 2945-2946, 2948.

Plaintiff's Br. 3-4. However, *Furnco* is a case concerning race discrimination, and does not discuss age discrimination at all. Plaintiff has attributed statements to this Court which were never made. Plaintiff apparently cannot make his argument without misstating both the evidence *and the law as previously determined by this Court.* This demonstrates that plaintiff's arguments are without basis in law, and that this appeal does raise issues which have not been resolved by this Court.

REASONS FOR GRANTING THE WRIT REPLY ARGUMENT

Petitioner notes at the outset that, throughout his argument, plaintiff misstates the facts and mischaracterizes the evidence, as discussed more fully in petitioner's reply to plaintiff's Statement of the Case.

I. The Eighth Circuit's Decision Raises Important Questions Regarding The Proper Allocation Of Burdens And Order Of Presentation Of Proof Under The Age Discrimination In Employment Act Which Have Not Been Settled By This Court.

Plaintiff relies upon the case of *Lorillard v. Pons,* 434 U.S. 575 (1978) in stating that his Court has already established the order and allocations of burdens of proof in a case brought under the Age Discrimination in Employment Act ("ADEA"), by drawing an analogy between the ADEA and Title VII of the Civil Rights Act of 1964. However, plaintiff has taken a small part of the *Lorillard* opinion out of context, thereby altering its

meaning. This Court's full statement as to the similarity between Title VII and the ADEA is as follows:

> Petitioner strives to . . . [compare] the ADEA with Title VII of the Civil Rights Act of 1964. . . . we find petitioner's argument by analogy to Title VII unavailing. There are important similarities between the two statutes, to be sure, both in their aims - the elimination of discrimination from the workplace - and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII. But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences. . . . Petitioner's reliance on Title VII, therefore, is misplaced.

434 U.S. at 584. This Court then went on to discuss the differences in the two statutes in detail.

In *Lorillard,* this Court held that an ADEA plaintiff has a right to a jury trial, and recognized that such a right did not necessarily exist under Title VII. 434 U.S. at 584-585. *See Great American Federal Savings & Loan Ass'n.,* 442 U.S. 366, 375 (1979). This distinction is significant when comparing the standards for the allocation of burdens in a Title VII case to the allocation of burdens in an age discrimination case. In a non-jury trial, all the issues are decided by the court, whereas in a case tried to a jury, no issues should be submitted to the jury if no issues of fact exist. It is therefore important for this Court to set standards as to the effect of an ADEA plaintiff's presentation of a prima facie case, and the effect of the ADEA defendant's rebuttal of that prima facie case by the presentation of legitimate, nondiscriminatory reasons for its actions.

II. In Light Of *Texas Department Of Community Affairs v. Burdine,* The Eighth Circuit Erred In Holding That There Was Evidence Of Discrimination Where The Employer Produced Evidence Of Legitimate, Nondiscriminatory Reasons For Its Actions, And There Was No Direct Evidence Of Discrimination And No Evidence Of Pretext.

Plaintiff contends that *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), holds that if a plaintiff raises a prima facie case of discrimination and the defendant rebuts the prima facie case by articulating legitimate, nondiscriminatory reasons for its actions, there is always an issue of fact remaining to be submitted to the jury. This ignores the clear holding and intent of *Burdine* which states that if the defendant carries its burden of articulation, "the presumption raised by the prima facie case is rebutted." *Id.* at 255.

This Court indicated its intent as to the effect of the defendant's rebuttal by stating that

> [t]he plaintiff . . . now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. . . . [The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. at 256. The plaintiff may satisfy that burden either in the initial presentation of his evidence or in his rebuttal - but he must, at some time, present some direct evidence of discrimination or evidence of pretext to support his case, once the inference raised by his prima facie case has been rebutted. As detailed in Westinghouse's Petition for a Writ of Certiorari at pages 11 and 13-14, plaintiff *never* presented any direct evidence of discrimination or evidence of pretext.

III. The Eighth Circuit's Decision Conflicts With The Decisions Of Other Courts Of Appeals With Respect To The Determination Of Whether A Plaintiff Makes Out A Submissible Jury Case Of Discrimination Where The Defendant Presents Evidence Of Legitimate, Nondiscriminatory Reasons For Its Actions.

Plaintiff argues that the cases cited by Westinghouse, illustrating a conflict between the Eighth Circuit and other circuit

courts of appeals, deal only with "the question of quantitative evidence." Plaintiff's Br. 10. Those authorities, however, as well as the present case, involve a total dearth of evidence of discrimination, other than the plaintiffs' own conclusory allegations. In those cases, as in the present case, the question was not the sufficiency of the evidence, but rather whether there was *any* evidence at all to raise an issue of fact.

For example, in *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980), the court found that, assuming a prima facie case had been made, it was sufficiently rebutted. *Id.* at 1066. Because there was *no* other evidence of discrimination, the court found it was proper to refrain from submitting the case to the jury. *Id.* Plaintiff notes the court's statement in *Smith* that the "only evidence that raised an inference of discrimination was Smith's own testimony which the trial court ruled irrelevant. *Id.* at 1066." Plaintiff's Br. 9. Similarly, the only evidence presented by the plaintiff in this case as to his ability to fill positions other than his own was his own self-serving statements that he "could have" filled those jobs, and there was no evidence that the persons who did fill those jobs were less qualified than plaintiff. Thus, the plaintiff in this case has not pointed to any direct evidence of discrimination or evidence of pretext, as there was none. The Eighth Circuit's decision in this case to the contrary is, therefore, in direct conflict with that of the Fourth Circuit in *Smith v. Flax.*

Finally, plaintiff states that if the cases cited by Westinghouse "stand for conflict between circuits, then this Court will be required to review all cases in which the jury could have found for one party or the other...." Plaintiff's Br. 10. However, petitioner is not asking that this Court review conflicts regarding the factual issues in a case, but that this Court review the conflict between the circuits regarding the proper allocation of burdens in an age discrimination case. The Fourth, Fifth, Sixth and Seventh Circuits have held that no issue of fact exists where the plaintiff's prima facie case is rebutted by the defendant's articulation of legitimate, nondiscriminatory reasons for its ac-

tions and the plaintiff at no time presents direct evidence of discrimination or evidence of pretext, whereas the Eighth Circuit has now held that issues of fact *do* exist under those same circumstances. Westinghouse has asked for this Court's review to resolve the conflict in the standard being applied to determine whether the evidence presented raises issues of fact. Such a standard can then be applied by all federal courts, uniformly, without the necessity of this Court's further review.

IV. The Eighth Circuit's Holding That A Sixty-Three-Year-Old Employee Who Elected Early Retirement After His Position Was Eliminated Due To Adverse Economic Conditions Established A Prima Facie Case Of Age Discrimination Conflicts With Those Of Other Courts Of Appeals.

Plaintiff claims that Westinghouse, "in essence," told him that "there is no need to apply for jobs, we will locate employment for you," (Plaintiff's Br. 10, n. 1), and thereby discriminated against plaintiff because no other job was found. However, at the same time that Westinghouse was attempting to find other placement for plaintiff, Westinghouse informed plaintiff, by letter to his counsel, that

> [a]lthough we are attempting to relocate Mr. Tribble, he should understand that there is no absolute guarantee of his placement, and therefore, our efforts should not preclude him from seeking employment both outside and inside the Company on his own.

Defendant's Ex. PP; *see* Tr. 272, 278-279, 289, 291.

As to plaintiff's discussion of *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981), petitioner maintains that that case *is* similar to this case. In order to bolster his argument that the cases are distinguishable, plaintiff misquotes a portion of the *Stanojev* opinion, attempting to indicate that Stanojev's position was eliminated due to his incompetence (Plaintiff's Br. 12). However, the Second Circuit actually noted that "[Stanojev] has not proved that his dismissal resulted from anything

other than a legitimate reason, i.e. elimination of the position *or* his own incompetence. Therefore, an inference of discrimination could not be raised in this manner." 643 F.2d at 920 (emphasis added). Similarly, in the present case, plaintiff did not prove anything other than that his job was eliminated for a legitimate reason,[2] and thus, under *Stanojev,* no prima facie case was made because no inference of discrimination was raised. The Eighth Circuit, however, in its opinion below, has now held to the contrary.

Plaintiff also notes that his "position was eliminated altogether. His duties were assumed by no one." Plaintiff's Br. 12. Plaintiff has admitted that his position did not remain open. Therefore, he cannot establish a prima facie case of age discrimination under the guidelines of *Cova v. Coca-Cola Bottling Co.,* 574 F.2d 958, 959 (8th Cir. 1978). (See Petition at p. 19). Yet, the Eighth Circuit, contradicting itself, held below that a prima facie case was established.

This case is also similar to *Price v. Maryland,* 561 F.2d 609 (5th Cir. 1977), although the Eighth Circuit's decision conflicts with the Fifth Circuit's decision in *Price.* As plaintiff notes, Price was discharged because he was the "most expendable," and a job had to be eliminated to match costs with revenues. *Id.* at 612. Similarly, in this case, plaintiff's position was eliminated in order to match costs with budgeted funds available, (see footnote 2, *infra*), and Westinghouse determined which positions to eliminate (a total of nine out of twenty) by determining which positions were most expendable: "We looked very carefully at the potentials within a piece of geography and determined from the potentials whether or not we could somewhat overlook that area of responsibility." Tr. 259-260.

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[2] It is interesting to note that plaintiff recognizes that his job "was eliminated in a corporate effort to cut costs," rather than for reasons related to his age (Plaintiff's Br. 12).

In his discussion of *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982), plaintiff attempts to distinguish his case by stating that he did not voluntarily retire, since he had only the choice of retiring or being discharged. Plaintiff's Br. 14. However, those are the same choices Ackerman had, yet the Sixth Circuit found there was no prima facie case because Ackerman voluntarily retired. The plaintiff in this case made the same choice. (See Petition at p. 22). The Eighth Circuit's decision in this case and that of the Sixth Circuit in *Ackerman* therefore are in direct conflict.

CONCLUSION

Plaintiff has attempted to bolster his arguments with misstatements of fact and law. When the facts in evidence are considered, and the law correctly stated, this case does raise issues which have never been decided by this Court. If, however, this Court finds that its decision in *Texas Department of Community Affairs v. Burdine* is applicable, then the Eighth Circuit's decision is directly in conflict with the law as set out by this Court. The Eighth Circuit has likewise made a decision in conflict with decisions of other federal courts of appeals, with respect to both (1) the determination as to whether any fact issues exist, and (2) the determination as to whether a prima facie case of age discrimination has been established.

Based on the foregoing reasons and authorities, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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